A

PAI KHEK MENG

v.

HARBI ALAN

B

HIGH COURT SABAH & SARAWAK, KUCHING
CLEMENT SKINNER J
[CIVIL APPEAL NO: 12-10-2004-I]
20 JUNE 2006

C ***CIVIL PROCEDURE:*** *Summary judgment - Appeal against - Application to adduce fresh evidence - Whether allowed - Whether bona fide issues raised - Whether required further investigation - Whether defendant has defence on merits to plaintiff's claim - Whether appeal allowed*

D ***CIVIL PROCEDURE:*** *Appeal - Fresh evidence - Admission of - Whether reasonable diligence would not have made new evidence available in subordinate court - Subordinate Courts Rules 1980, O. 49 r. 6(4)(a) - Whether satisfied - Whether fresh evidence would have had a determining influence upon decision of subordinate court - Whether* E *defendant has defence on merits to plaintiff's claim - Whether appeal allowed*

EVIDENCE: *Fresh or further evidence - Admission of, on appeal - Whether reasonable diligence would not have made new evidence available* F *in subordinate court - Subordinate Courts Rules 1980, O. 49 r. 6(4)(a) - Whether satisfied - Whether fresh evidence would have had a determining influence upon decision of subordinate court - Whether defendant has defence on merits to plaintiff's claim - Whether appeal allowed*

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There were two matters before the court herein: (i) an appeal brought by the defendant against the decision of the Sessions Court Judge who, on 19 March 2004, granted judgment against the defendant on an application for summary judgment by the H plaintiff under O. 26A Subordinate Courts Rules ('SCR') and (ii) an application by the defendant to be permitted to adduce fresh evidence at the hearing of his appeal, to show why summary judgment should not have been granted against him. Briefly, the plaintiff had commenced an action claiming a sum of RM65,001 I being the amount allegedly payable by the defendant to the plaintiff as the consideration for 65,001 ordinary shares of RM1 each in a company called Foresin Sdn Bhd, allegedly sold and

transferred to the defendant by the plaintiff, which the defendant had allegedly refused or neglected to pay for. However, according to the defendant, the claim against him for RM65,001 was a contrived claim. The plaintiff opposed the defendant's application and pointed out that O. 49 r. 6(4) SCR stipulated that at the hearing of the appeal fresh evidence should not be admitted unless the judge was satisfied that (a) at the hearing in the subordinate court the new evidence would not have made it so available and (b) the fresh evidence, if true, would have had or would have been likely to have a determining influence upon the decision of the subordinate court. The plaintiff also claimed that the defendant had been given sufficient time to file a defence or an affidavit to oppose the application for summary judgment but had instead placed more importance to attending to other matters than his legal affairs and so his application should be refused. Further, the plaintiff submitted that the defendant's application to adduce fresh evidence operated in effect as an application for extension of time to file an affidavit in reply to oppose the plaintiff's application for summary judgment which should be disallowed as the defendant had delayed for some seven months in doing so.

Held (allowing defendant's application to adduce fresh evidence and allowing the appeal; setting aside judgment entered against defendant):

(1) The defendant had satisfied the second limb of sub-rule (4)(a) of O. 49 r. 6 *ie*, that reasonable diligence on his part would not have made the new evidence available in the subordinate court. The facts showed that the defendant was keen to defend the action and to resist the plaintiff's claim. This was not a case where the defendant, after being served the summons, had simply ignored it and taken a lackadaisical attitude towards the claim. Here, the defendant had appeared on the return date to dispute the claim. Given the fact that the defendant had genuinely tried but failed to secure the services of two different lawyers to defend the plaintiff's claim, this court did not see what other steps the defendant could have taken by way of reasonable diligence to put the evidence which he hoped to rely on before the court on 19 March 2004 *ie*, the day fixed for the hearing of the plaintiff's application for summary judgment, apart from requesting for an adjournment to try and engage counsel. Accordingly, the

A defendant had acted with reasonable diligence to make available the evidence he now relied on at the hearing in the subordinate court, but was unable to do so. (paras 20 & 21)

(2) In a case such as this where judgment had been entered B because the defendant did not comply with some procedural rule, the court was more concerned with the justice of the case. The approach taken by the court has always been that, whenever possible, a case should be decided on its merits and that a defendant should not be shut out from defending a C claim, particularly where he could show a defence on the merits. Further, any question of delay must be looked at in the context in which the question arose. Here, the defendant had applied for an adjournment to be able to show cause against the application for summary judgment. If that had been D allowed there would not be the seven months delay the plaintiff had complained about. Accordingly, the defendant's application could not be defeated on the ground of delay. (para 22)

E **(3)** The defendant was well able to show that the fresh evidence, if true, would have had or would have been likely to have a determining influence upon the decision of the subordinate court *ie*, while the plaintiff claimed that RM65,001 was the purchase price for 65,001 ordinary shares of RM1 each in Foresin Sdn Bhd which were transferred to the defendant by F the plaintiff, the defendant denied this to be so and had produced the letter of confirmation from Mr Wung as Managing Director of Foresin Sdn Bhd that the company was sold to the defendant for RM2,200 only. In light of such evidence, which, if true, would tend to negate the plaintiff's G claim, the defendant's assertion that he had never met the plaintiff nor had any dealing with him, let alone reach an agreement with him to pay him RM65,001 for the shares, gave rise to a *bona fide* issue that required further investigation. The defendant's application to admit fresh evidence in this H appeal should be allowed. (paras 25 & 28)

(4) The burden was on the defendant to show that he had a defence on the merits to the plaintiff's claim. The fresh evidence this court allowed to be adduced in this appeal went I towards showing that the defendant does have a defence on the merits to the plaintiff's claim. On this ground alone, the defendant's appeal should be allowed. (para 30)

Case(s) referred to:

Bank Negara Malaysia v. Ismail & Ors. [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC
Bank of China v. Ngan Chin Wen [2004] 6 CLJ 290 HC
Evans v. Bartlam [1937] AC 473
Hoo Kok Chong v. Yong Thin [2004] 1 CLJ 265 CA
Ladd v. Marshall [1954] 3 All ER 745
Lau Foo Sun v. Government of Malaysia [1970] 2 MLJ 70
Lim Goh Huat v. Saw Keng See [1998] 6 MLJ 600
Maju Holdings Sdn Bhd v. Fortune Wealth (HK) Ltd & Ors [2004] 4 CLJ 282 CA
National Company for Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 SC
Tsoi Ping Kwan v. Loh Lai Ngoh & Anor [1997] 3 CLJ 552 CA

Legislation referred to:

Evidence Act 1950, ss. 91, 92
Rules of the Supreme Court 1980, r. 51
Subordinate Courts Rules 1980, O. 26A r. 4(1), O. 49 r. 6(4)(a)

For the appellant/defendant - Chen Chieng Ning; M/s Chen Chieng Ning & Co
For the respondent/plaintiff - Sharifah Zaaimah; M/s Detta Samen & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Clement Skinner J:

[1] There are two matters before the court. The first is an appeal brought by the defendant in the court below, against the decision of the learned Sessions Court Judge who, on 19 March 2004, granted judgment against the defendant on an application for summary judgment by the plaintiff under O. 26A Subordinate Courts Rules ('the SCR'). The second is an application by the defendant/appellant to be permitted to adduce fresh evidence at the hearing of his appeal, to show why summary judgment should not have been granted against him. For convenience I will continue to refer to the appellant as the defendant and to the respondent as the plaintiff.

[2] Actually there were four matters before the court to begin with but the other two matters have resolved themselves. For completeness I will briefly mention what these other two matters concerned. When the defendant filed his record of appeal, he had included in it an affidavit affirmed by him on 16 April 2004. This affidavit was not before learned Sessions Court Judge when the plaintiff's application for summary judgment was heard because it was only filed into court after judgment was granted against him. Accordingly the plaintiff regarded the inclusion of the affidavit of 16 April 2004 in the record of appeal as wrongful and filed in an application to strike out the record of appeal and consequently, the appeal as well.

[3] The other matter before the court was an application by the defendant to amend his record of appeal by withdrawing therefrom the offending affidavit of 16 April 2004.

[4] On the defendant being allowed to amend his record of appeal by withdrawing the offending affidavit therefrom, the defendant's application to strike out the record of appeal became otiose and so I struck it out, but granted costs to the plaintiff since he was compelled to file the striking-out application by what the defendant had done.

[5] The facts giving rise to the appeal and application to adduce fresh evidence are these. In setting out the facts, it will also be useful to give a chronology of events.

[6] On 22 October 2003 the plaintiff commenced an action at the Sessions Court, Kuching, claiming a sum of RM65,001 being the amount allegedly payable by the defendant to the plaintiff as the consideration for 65,001 ordinary shares of RM1 each in a company called Foresin Sdn Bhd, allegedly sold and transferred to the defendant by the plaintiff, which the defendant had allegedly refused or neglected to pay for.

[7] The following events then occurred:

(1) On 9 January 2004 the summons was served on the defendant. The return date for the summons was 16 January 2004;

(2) On 16 January 2004 the defendant appeared in person at the Sessions Court and disputed the claim. He was granted 30 days to file a defence;

(3) Before a defence was filed the plaintiff applied for summary judgment against the defendant. On 15 February 2004 an unsealed copy of the notice of application for summary judgment was served on the defendant and on 23 February 2004, a sealed copy of the application was served on him. The application for summary judgment was fixed for hearing on 19 March 2004;

(4) On 19 March 2004 the defendant appeared in person before the Sessions Judge and requested an adjournment of the hearing of the plaintiff's application for summary judgment but, on objection taken by counsel for the plaintiff, the learned Sessions Judge refused the same and thereafter allowed the plaintiff's application in terms. It is best to set out here what transpired before the learned Sessions Judge on 19 March 2004. The notes of proceedings recorded by the Sessions Judge states:

19th March, 2004.

Coram: Puan Yew Jen Kie
Hakim Mahkamah Sesyen

Jurubahasa: Puan Ngui Siew King

Miss Sharifah Zaaimah for the plaintiff.

Defendant in person.

Defendant: I request for an adjournment as I am busy working for the Government during the election campaign.

Miss Sharifah: I object as the Defendant has been given 30 days to file the defence which he has failed to do so, and he has also failed to file an affidavit in opposition to the plaintiff's application.

Court: The Defendant was ordered by the court on 16.1.2004 to file his defence within 30 days which he has until now failed to do. The notice of the Plaintiff's application

> was served on him on 23.2.2004 which is around 19 days before today hearing. There has been ample time given to the defendant to either file his statement of defence or affidavit in opposition, in the absence of good reason, I disallow the application for further adjournment. Since no affidavit in opposition being filed to show cause against the Plaintiff's application, I allow the Plaintiff's application in terms as therein prayed therein.
>
> Yew Jen Kie.

[8] Being dissatisfied with the decision of the learned Sessions Judge, the defendant has brought this appeal. However, the defendant faces a difficulty in prosecuting his appeal, in that, he did not file a defence to the plaintiff's claim or file an affidavit to oppose the application for summary judgment in the lower court. Without having done so, how does the defendant demonstrate in the appeal that he has a defence on the merits to the plaintiff's claim? Accordingly, the defendant has applied to be allowed to adduce fresh evidence at the hearing of his appeal, in the form of an affidavit affirmed by him on 30 October 2004 in which he explains why he did not file in a defence or file an affidavit to oppose the application for summary judgment and that he has a defence on the merits to the plaintiff's claim, a draft of which was exhibited.

[9] The defendant explained that he appeared in court on 16 January 2004 to dispute the plaintiff's claim as he genuinely believed he had a good defence to it. On being given 30 days to file a defence, he says he went to see a named lawyer (hereafter 'the 1st lawyer') to take up his case. This lawyer asked the defendant to return to see her in February as the Chinese New Year fell on 22 January 2004. The defendant, who works as an Information Officer with the Ministry of Information Malaysia, said that after the Chinese New Year celebration, in about late January 2004, he was informed by his superior that the General Elections would be held soon. The defendant then became involved in election work and as a member of a political party (Sarawak Unite Peoples' Party) helped organise 'meet the people' sessions, press conferences etc so much so that he found it difficult to find time to attend to his legal matters.

[10] Then on 15 February 2004 the defendant says he received the unsealed copy and, on 23 February 2004, the sealed copy of the plaintiff's application for summary judgment which he noted required him to be present in court on 19 March 2004 for its hearing. The defendant says he was confused by the application as he was unsure whether he still needed to file a defence or not in view of the application. In late February or early March 2004 the defendant went to see the 1st lawyer again, who asked him to leave all his documents with her to study. A week later the defendant was informed by the 1st lawyer that she was unable to act for him as she was not experienced enough to handle this case. So about two or three weeks before the hearing date on 19 March 2004, the defendant went to see another lawyer ('the 2nd lawyer') in a named firm of advocates, but the 2nd lawyer said there was insufficient time for her to prepare so she could not assist the defendant. Accordingly, the defendant said that being unable to secure the services of a lawyer, he had little choice but to appear in person on 19 March 2004 to ask for an adjournment so that he could get legal advice, but his application was refused.

[11] After judgment was entered against him the defendant went to see the 2nd lawyer again, who said she would act for the defendant in his appeal. Accordingly the defendant affirmed the affidavit of 16 April 2004 which was filed in the lower court and included in the record of appeal by the 2nd lawyer. However, before the hearing of this appeal the defendant was informed by the 2nd lawyer that she could no longer act for him for non-payment of her fees. It was only just before the hearing of this appeal that he managed to secure the services of his present counsel.

[12] As regards a defence on the merits, the defendant denies the sum of RM65,001 is payable to the plaintiff in respect of the alleged purchase of shares in Foresin Sdn Bhd. The defendant alleges that in 1999 he wanted to set up a company for a computer business and discussed his business plan with a friend named Mr. Wung Heok Hoi who offered to help the defendant to look for an already incorporated 'empty-shell' company (I think he means 'shelf-company') which the defendant could buy for RM2,200 for his computer business. The defendant allegedly agreed to Mr. Wung's offer. Mr. Wung then allegedly informed the defendant that Foresin Sdn. Bhd. was the company for sale

A and also offered to become a shareholder in the company along with his (Mr. Wung's) brother-in-law as they were keen to invest in the defendant's computer business. Accordingly the defendant says that some time in December 1999 Mr. Wung extended to him a Form 32A being the Companies Form of Transfer of
B Security which the defendant signed, in blank, as transferee, but he allegedly took a photocopy of the Form 32A before returning it to Mr. Wung.

[13] The defendant says that to make sure he was purchasing
C Foresin Sdn. Bhd. for RM2,200,00, he obtained a written confirmation on the letter-head of Foresin Sdn. Bhd. which was signed by Mr. Wung, that Foresin Sdn Bhd had been sold to him for RM2,200. According to the defendant he has never met the plaintiff nor has he had any dealings with the plaintiff. According
D to the defendant, the purchase of Foresin Sdn Bhd was brokered through Mr. Wung.

[14] After signing the Form 32A, the defendant changed the name of Foresin Sdn Bhd to I-Zone Computer Sdn Bhd.
E However, by the end of 2002 the defendant says the computer business was not successful and there was a falling out between him and Mr. Wung. In July 2003 the defendant apparently lodged a police report against Mr. Wung. In August 2003 the defendant received a fax from Mr. Wung warning him that the plaintiff would
F commence legal action for RM65,001. According to the defendant, on 9 January 2004 when this action was commenced, it was more than four years after he had acquired the shares in Foresin Sdn Bhd. He alleges that this action was instigated by Mr. Wung, with the plaintiff acting as his nominee. According to the defendant the
G claim against him for RM65,001 is a contrived claim, with the amount of RM65,001 being inserted as the consideration sum in the Form 32A after it was executed by him. According to the defendant, it makes no commercial sense, to pay RM65,001 for shares in a 'empty-shell' company. To support of what he alleges
H the defendant produced the following documentary exhibits:

(a) a photocopy of an undated Form 32A allegedly executed by the plaintiff as transferor and defendant as transferee in respect of 65,001 ordinary shares in Foresin Sdn Bhd which shows the consideration column left blank;

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(b) letter dated 21 January 2000 on Foresin Sdn Bhd letter-head addressed to the defendant, signed by Mr. Wung as Managing Director, confirming that Foresin Sdn Bhd has been sold to the defendant for RM2,200 ('the letter of confirmation');

(c) the statement of accounts for Foresin Sdn Bhd for the years ended 30 June 1999 and 30 June 2000 which shows the company to have a negative worth;

(d) certificate issued by the then Registrar of Companies on 22 December 1999 certifying change of name of Foresin Sdn Bhd to I-Zone Computer Sdn Bhd.

[15] So the first issue for determination is whether the defendant should be allowed to adduce fresh evidence at this appeal.

[16] The plaintiff opposes the application and points out that O. 49 r. 6(4) SCR stipulates that at the hearing of the appeal fresh evidence shall not be admitted unless the judge is satisfied that (a) at the hearing in the subordinate court the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and (b) the fresh evidence, if true, would have had or would have been likely to have a determining influence upon the decision of the subordinate court. In support of this objection counsel for the plaintiff relied on three cases, namely, *Bank of China v. Ngan Chin Wen* [2004] 6 CLJ 290, *Hoo Kok Chong v. Yong Thin* [2004] 1 CLJ 265 and *Maju Holdings Sdn Bhd v. Fortune Wealth (HK) Ltd & Ors* [2004] 4 CLJ 282. The plaintiff also says that the defendant had been given sufficient time to file a defence or an affidavit to oppose the application for summary judgment but had instead placed more importance to attending to election matters than his legal affairs and so his application should be refused. The plaintiff further says that the defendant's application to adduce fresh evidence operates in effect as an application for extension of time to file an affidavit in reply to oppose the plaintiff's application for summary judgment which should be disallowed as the defendant has delayed for some seven months (after obtaining the services of the second lawyer) in doing so. According to the plaintiff, if the defendant's affidavit of 30 October 2004 is read in this appeal, it would mean that a party in breach of the rules would have an unqualified right to an extension of time to comply with the rules, which would clearly defeat the purpose of the rules which provides a time-table for the conduct of litigation.

[17] The prohibition contained in O. 49 r. 6(4) SCR to fresh evidence being admitted at the hearing of an appeal, unless the conditions stated therein are satisfied is, in substance, a reflection of the test laid down in *Ladd v. Marshall* [1954] 3 All ER 745, which was applied in our jurisdiction by the Federal Court in *Lau Foo Sun v. Government of Malaysia* [1970] 2 MLJ 70. In two of the cases relied on by the plaintiff, namely, *Bank of China v. Ngan Chin Wen* and *Maju Holding Sdn Bhd v. Fortune Wealth*, the decision in *Lau Foo Sun* was applied and followed. However, counsel for the defendant has referred me to the decision of the Court of Appeal in *Tsoi Ping Kwan v. Loh Lai Ngoh & Anor* [1997] 3 CLJ 552 which makes it clear that the test laid down in *Ladd v. Marshall* only applies at the appellate level after a trial on merits; the test does not apply to interlocutory matters, as is the case here. In *Tsoi Ping Kwan*, at p. 555 of the report, the Court of Appeal said (per Gopal Sri Ram JCA):

> The third motion was taken out by the first respondent seeking to admit three documents by way of further evidence to show repayment. It was opposed by the appellant on the ground that the test laid down in *Ladd v. Marshall* [1954] 3 All ER 745 had not been met. *Ladd v. Marshall* was referred to and applied by the former Federal Court in *Lau Foo Sun v. Government of Malaysia* [1970] 2 MLJ 70 where Suffian FJ (as he then was) stated the requirements in this way (at p 71):
>
> > To justify the reception of further evidence, three conditions must be fulfilled:
> >
> > First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
> >
> > Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive;
> >
> > Third, the evidence must be such as is presumably o be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible.
>
> Now, it must be borne in mind that the Ladd v. Marshall test applies to cases where further evidence is sought to be admitted at the appellate level after a trial on merits. It does not apply to interlocutory matters. This is made clear by the judgment of Gunn Chit Tuan SCJ (as he then was) in *William Jacks & Co (M) Sdn*

Bhd v. Chemquip (M) Sdn Bhd & Anor [1991] 2 MLJ 555, where, when delivering the unanimous decision of the Supreme court, he said (at p 557):

> Firstly, in so far as the said notice of motion was concerned, we consider that the conditions laid down in *Ladd v. Marshall* regarding the strict approach for fresh evidence to be admitted on appeal only applies where there has been a trial or hearing on the merits. But where there has not been a trial or hearing on the merits as in this case, the *Ladd v. Marshall* conditions do not apply. But this court has in any case a full and general discretion whether to admit fresh evidence.
>
> The present appeal comes well within the purview of the exception to the *Ladd v. Marshall* test. The submission by En Wong Chong Wah of counsel for the appellant that the test applies notwithstanding that this is an interlocutory appeal plainly overlooks the decision in *William Jacks*. We entertained no difficulty in rejecting it and granting the orders sought by the first respondent in its motion.

[18] Counsel for the defendant urges me to follow the decision in *Tsoi Ping Kwan* and *William Jacks & Co.* but I do not think that is a course open to me for the following reasons. First, even though the decisions in those two cases were on interlocutory matters, they arose from decisions of the High Court. Secondly, *William Jacks & Co.* was decided in the context of r. 51 of the Rules of the Supreme Court 1980. Here the appeal arises under O. 49 r. 6 SCR which specifically relates to appeals from any decision 'other than a decision made after trial'. In other words, this appeal arises under a rule which relates to appeals against decisions relating to interlocutory matters only and not to decision made after a trial. In my judgment the Rules Committee must be assumed to be aware of the decision in *William Jacks & Co.* but has seen it fit to expressly prohibit the reception of fresh evidence even on appeals on interlocutory matters, unless the two conditions stated in sub-rule (4) of O. 49 r. 6 is met. Accordingly, I am bound to give effect to the provisions of sub rule (4), which a superior court hearing an appeal from a decision of the High Court on an interlocutory matter is not so bound by.

[19] Does the defendant satisfy the requirements of sub-rule (4)? In deciding this question I make the following observations about the sub-rule. First, I accept it that the conditions stated in sub-rule (4)(a) and (b) are cumulative. Second, there are two limbs to sub-rule 4(a) which are expressed in the alternative. Accordingly to satisfy sub-rule (a), a party may either show that at the hearing in the subordinate court the new evidence was not available to him, or, that reasonable diligence would not have made it so available. With that I turn to consider whether the defendant has satisfied the requirements of sub-rule 4(a).

[20] On the materials placed before me, I find that the defendant has not satisfied the first limb of sub-rule (a), since the new evidence which he wishes the court to consider in hearing his appeal was already available to him at the hearing of the plaintiff's application for summary judgment on 19 March 2004. However, I find that the defendant has satisfied the second limb of sub-rule (a) ie, that reasonable diligence on his part would not have made the new evidence available in the subordinate court on 19 March 2004. I say so for the following reasons. The facts show that the defendant was keen to defend the action and to resist the plaintiff's claim. This is not a case where the defendant, after being served the summons, has simply ignored it and taken a lackadaisical attitude towards the claim. Here the defendant appeared on the return date to dispute the claim. On being given 30 days to file a defence and on being served the application for judgment he did try to secure the services of two different lawyers to defend the claim and oppose the application for judgment. It is true that the defendant immersed himself in election work, but I do not think he should be faulted for doing so, after all such work was not unrelated to his employment and his political affiliations. Despite the defendant having to attend to election work and despite not being able to secure the services of a lawyer by the date fixed for the hearing of the plaintiff's application for summary judgment, the fact remains that the defendant did not let judgment go by default but instead appeared on 19 March 2004 to ask for an adjournment. The fact that he was not astute enough to put all the relevant and material facts before the learned sessions judge to support his application for an adjournment should not be held against him as he is, after all, a layman. Although at first blush it appears that the defendant had devoted too much attention to his election work, it would, in my judgment, be wrong to equate his

doing so with a lack of reasonable diligence on his part to defend the claim. To me it was more a case of the defendant having got his priorities wrong, but that does not necessarily mean there was a lack of diligence on his part.

[21] Given the fact that the defendant had genuinely tried, but failed to secure the services of two different lawyers to defend the plaintiff's claim, I do not see what other steps the defendant could have taken by way of reasonable diligence to put the evidence which he hoped to rely on before the court on 19 March 2004 ie, the day fixed for the hearing of the plaintiff's application for summary judgment, apart from requesting for an adjournment to try to engage counsel. I also take into account the fact that the defendant's application for adjournment was the first such application by the defendant and that, if granted, would not have caused any prejudice to the plaintiff which could not be compensated by an award of costs. If the application for adjournment had been allowed the defendant would, in all probability, have been able to engage a lawyer and put before the subordinate court the evidence which he now relies on, to show cause against the plaintiff's application for summary judgment. Accordingly I find the defendant had acted with reasonable diligence to make available the evidence he now relies on at the hearing in the subordinate court, but was unable to do so.

[22] With regard to the plaintiff's arguments that the defendant has been given sufficient time to defend the action and that to allow the defendant's application to adduce fresh evidence would be seen as rewarding a party who has acted in breach of the rules, my response is that in a case such as this where judgment has been entered because the defendant did not comply with some procedural rule the court is more concerned with the justice of the case. The approach taken by the court has always been that, whenever possible, a case should be decided on its merits and that a defendant should not be shut out from defending a claim, particularly where he can show a defence on the merits. For the reasons I have already given and am about to give, this is such a case. Further, any question of delay must be looked at in the context in which the question arises. Here the defendant had applied for an adjournment to be able to show cause against the application for summary judgment. If that had been allowed there

would not be the seven months delay the plaintiff complains about. Accordingly I find that the defendant's application cannot be defeated on the ground of delay.

[23] The next question to be decided is whether the defendant can satisfy sub-rule (b) ie, the fresh evidence, if true, would have had or would have been likely to have a determining influence upon the decision of the subordinate court? In considering this question, it must be borne in mind that the application before the subordinate court on 19 March 2004 was an application for summary judgment. On the hearing of such an application the plaintiff will *prima facie* become entitled to judgment where the following conditions are met, namely, a statement of claim has been served on the defendant; the affidavit in support has verified the facts on which the claim, or part thereof, is based; and the affidavit states that in the deponent's belief there is no defence. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him. (See *National Company for Foreign Trade v. Kayu Raya Sdn. Bhd.* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 (SC)). In discharging the burden that shifts onto him a defendant need only show that he has a *bona fide* defence on the merits to the plaintiff's claim; he need not show that he has a complete defence or that his defence is bound to succeed. (See *Evans v. Bartlam* [1937] AC 473 and *Bank Negara Malaysia v. Ismail & Ors.* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14). In *Lim Goh Huat v. Saw Keng See* [1998] 6 MLJ 600 Abdul Kadir Sulaiman J (as he then was) described the burden on a defendant in an O. 26A application in this way:

> An application for summary judgment under O. 26A of the SCR 1980 in the subordinate courts is equivalent to an application under O. 14 of the RHC 1980 in the High Court. In the circumstances, the same principle of law applies. This provision for obtaining judgment without trial and without waiting for delivery of defence is intended to apply to cases which are virtually uncontested or incontestable ... Such an application of this nature is allowed by the rules to be made by a plaintiff even before a defence is filed provided that the statement of claim has been served on the defendant. The ground allowing such a plaintiff to do so is that the case being plain and obvious, the plaintiff can even satisfy the court without the defence being filed, on the statement of claim itself the defence if there is to be any, is as sham ... Upon such an application being made, it is upon the defendant to show cause against the application by evidence to satisfy the court that there

is an issue or question in dispute which ought to be tried, in order to defeat the application for summary judgment. The show cause may so grounded on technicality or on merit ... .

[24] I respectfully agree with what was stated above by the learned judge.

[25] Reverting to the question before the court, and bearing in mind that the burden on the defendant is only to show a defence on the merits, I find that the defendant is well able to show that the fresh evidence, if true, would have had or would have been likely to have a determining influence upon the decision of the subordinate court. I say so for the following reasons. While the plaintiff claims that the RM65,001 is the purchase price for 65,001 ordinary shares of RM1 each in Foresin Sdn. Bhd. which were transferred to the defendant by the plaintiff, the defendant denies this to be so and has produced the letter of confirmation dated 21 January 2000 from Mr. Wung as Managing Director of Foresin Sdn. Bhd. that the company was sold to the defendant for RM2,200 only. In the light of such evidence which, if true, would tend to negate the plaintiff's claim, the defendant's assertion that he had never met the plaintiff nor had any dealings with him, let alone reach an agreement with him to pay him RM65,001 for the shares, gives rise to a *bona fide* issue that requires further investigation. Likewise, the defendant's assertion that he had bought a 'empty-shell' company for RM2,200 through Mr. Wung, is given some measure of credence by the letter of confirmation of 21 February 2000, which is a matter that requires further investigation. Further, in the light of the statement of accounts of Foresin Sdn. Bhd. for the years ended 30 June 1999 and 30 June 2000, the defendant's assertion that he would not buy an 'empty-shell' company of negative worth for RM65,001 is a matter that requires further investigation.

[26] With regard to the defendant's assertion that the plaintiff's claim is contrived and that it is brought by the plaintiff as a mere nominee of Mr. Wung who is the real 'mind' behind this action, given the fact that the documents now before the court ie, the letter of confirmation on Foresin Sdn. Bhd. letter-head and the statement of accounts of Foresin Sdn. Bhd., do indicate that Mr. Wung also became a share holder in the company, and his involvement in the defendant's acquisition of the company, the defendant's assertion cannot be simply brushed aside, but requires further investigation.

[27] With regard to the defendant's assertion that the share transfer form (Form 32A) was signed blank, the plaintiff says that ss. 91 and 92 of the Evidence Act would operate to preclude the defendant from raising such point, but it is my view that whether or not the defendant is precluded from doing so gives rise to a serious question of law which is to be decided by the subordinate court. For present purposes, the fact that the defendant is able to show a Form 32A, *albeit* a photocopy, that is signed blank does give some support to his assertion that the claim against him is contrived. It is a matter that needs further investigation.

[28] For all the above reasons I allow the defendant's application to admit fresh evidence in this appeal, subject to what I say about costs later on. With that I move on to consider the merits of the appeal.

[29] The outcome of the defendant's appeal depends very much on the outcome of his application to admit new evidence. If that had failed then the defendant would be hard-put to show cause against the plaintiff's application for summary judgment. Now that I have allowed the defendant's application I would say this: A perusal of the record of appeal shows that on the hearing of the plaintiff's application for summary judgment, he became *prima facie* entitled to judgment for his claim as the statement of claim in this action had been served on the defendant, the plaintiff's affidavit in support had verified his claim and he had averred that in his belief, there was no defence to his claim. Accordingly the burden had shifted to the defendant to satisfy the court why judgment should not be given against him. That is the same position which the defendant finds himself in, in this appeal which comes before me by way of a re-hearing.

[30] The burden on the defendant is to show that he has a defence on the merits to the plaintiff's claim. As far as that is concerned, it must follow from what I have said when considering whether to allow the defendant's application to admit fresh evidence, particularly when considering whether the new evidence satisfies sub-rule (b), that the fresh evidence which I have allowed to be adduced in this appeal does go towards showing that the defendant does have a defence on the merits to the plaintiff's claim since everything I said there will have equal application here. On this ground alone the defendant's appeal should be allowed. Quite apart from the above, there is a further ground on which it should

be allowed. On the hearing of an application for summons judgment the defendant is permitted to show cause against the application by affidavit or otherwise (see O. 26A r. 4(1) SCR). The defendant says that as a matter of law, he can show that the plaintiff's claim is time barred under item 93 of the schedule to the Limitation Ordinance Laws of Sarawak Cap. 49, which provides that for a claim for compensation for the breach of any contract not in writing, the suit must be brought within three years from the date the contract is broken. According to the defendant, as the plaintiff had not pleaded in his statement of claim the completion date for the sale and purchase of shares, the date of the transfer in Form 32A ie, 20 December 1999 must be taken as the completion date. However, this suit being only commenced on 22 October 2003, which is more than three years from when the contract was broken, it is time barred.

[31] Counsel for the plaintiff says this point should not be considered by the court as it was never raised before the learned Sessions Judge. I do not agree. This appeal proceeds before me by way of rehearing and the defendant can raise or take points which were not raised before the lower court. Here, even without relying on the fresh evidence, the defendant can take the point on limitation on the face of documents then before the lower court. To my mind the question whether the plaintiff's claim is barred by limitation or not gives rise to a triable issue which is to be decided by the trial court.

[32] In the result I make the following orders: I allow the defendant's application to adduce fresh evidence but with costs to the plaintiff. I also allow the appeal with no order as to costs. Each party is to bear its own costs in the appeal. I make this order as I find that while the defendant has been constrained to bring this appeal, the plaintiff shares no blame for the defendant having to do so and should not be burdened with the defendant's costs in doing so. I also set aside the judgment entered against defendant. I order the defendant to file his defence within 14 days from the date hereof and remit this case for trial before the Sessions Court Kuching.